

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0103014551:

KATHERINE EASTON,) Case No. 1406-2011
)
Charging Party,) HEARING OFFICER DECISION
) GRANTING SUMMARY
vs.) JUDGMENT AND
) DISMISSING CASE
SNG, INC., d/b/a 3G's,)
)
Respondent.)

* * * * *

I. INTRODUCTION

The respondent has moved for summary judgment in this matter. It argues that the charging party cannot prove her prima facie case because she cannot show that the respondent discriminated against her by refusing to permit her to use her dog in the respondent's store as the dog was not a service animal and was not, therefore, a reasonable accommodation. Though directed to respond, the charging party has failed to do so. Having considered the respondent's motion and supporting affidavits and evidence, the hearing officer agrees with the respondent that summary judgment is appropriate in this matter as the charging party cannot show that the use of her non-service animal, her pet dog, in the respondent's store was a request for a reasonable accommodation.

II. UNDISPUTED FACTS

The following facts are established by competent evidence in the respondent's motion and have not been disputed by the charging party (as the charging party has not responded to the motion):

1. Easton uses a wheel chair to ambulate and owns a pet dog.
2. Easton's neurologist, Dr. Ronald Murray, has not discussed with Easton or otherwise suggested to her the necessity of Easton having any sort of service

animal in relationship to any disability she might have. Exhibit A to SNG's motion for summary judgment.

3. Easton's dog has not been trained to alert her to or otherwise assist her with seizures.

4. Easton did not use any materials, including any written materials, to train her dog. Easton Depo. at p. 5.

5. Easton did not use any third party to train her dog.

6. Although Easton uses a wheelchair, there is no evidence that her dog is needed to assist or even capable of assisting her in utilizing her wheel chair.

7. Easton's dog does not help her with her shopping.

8. Easton's dog does not assist her in the identification of grocery items.

9. Easton's dog is not a service animal under either the Montana Human Rights Act (MHRA) or the Americans with Disabilities Act (ADA).

10. No competent evidence has been produced in this case to show that Easton's dog is either necessary or even able to assist her to overcome any barrier to equal accommodation that she claims to face.

III. DISCUSSION

A. The Summary Judgment Standard Under the MHRA.

Montana's Rules of Civil Procedure and Rules of Evidence apply in this case. Rule 56 (e), M.R. Civ. Pro, requires a party opposing a motion for summary judgment to respond with competent evidence in opposition to the motion. If the opposing party fails to respond, summary judgment, if appropriate, must be entered against the party opposing the motion. *Id.*

Heiat v. E.M.C., 275 Mont. 322, 912 P.2d 787, 793,(1996) delineates the summary judgment standard for cases arising under the MHRA when the respondent moves for summary judgment. Under that standard, the respondent must first make a showing that no material issue of fact exists and that as matter of law the respondent is entitled to judgment in its favor. When the respondent makes such a showing, the charging party must then come forward with some version of facts that,

if believed, would create a reasonable inference that she can make a prima facie showing of discrimination. Heiat, 912 p.2d at 793. Mere denial and speculation are not sufficient to meet the Heiat standard. Rule 56 (e), M.R. Civ. Pro, Bruner v. Yellowstone County, 272 Mont. 261, 264, 900 P.2d 901, 903 (1995). Conclusory and interpretive statements of material fact do not rise to the level of genuine issues of material fact required to defeat a motion for summary judgment. Caplin v. Zortman Mining, Inc., 267 Mont. 53, 61, 881 P.2d 1306, 1311 (1994).

The ADA provides that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases, or operates a place of public accommodation. See Poulson v. Montana Work Force Service, 2008 WL 5412443*4 (D.Mont. 2008). This ADA provision is similar to Montana law. See Mont. Code Ann. § 49-2-304; Admin. R. Mont. 24.9.609. Reference to federal case law is both appropriate and helpful in construing the MHRA because the statute was closely modeled after Title VII. McDonald v. Department of Environmental Quality, 2009 MT 209 , 351 Mont. 243 , 214 P.3d 749.

An individual alleging discrimination under the ADA must allege and establish that: (1) she is disabled as that term is defined by the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; (3) the defendant employed a discriminatory policy or practice; and (4) the defendant discriminated against the plaintiff based upon the plaintiff's disability by (a) failing to make a requested reasonable modification that was (b) necessary to accommodate the plaintiff's disability. Paulsen, supra. Accordingly, a viable claim necessarily requires proof that the alleged discriminatory conduct was "on the basis of" the plaintiff's disability and there must be a causal connection between the alleged discrimination and the plaintiff's alleged disability. Paulsen, supra. Here, as the respondent correctly points out in its motion, the charging party cannot prove element (4) of her claim.

B. The Use of Service Animals Under the ADA and MHRA.

While it is clear that the ADA provides for a person's use of service animals in a public accommodation, there must be evidence that the animal is a service animal and not just a pet. See generally, 28 CFR 36.104. Under the ADA, the work or tasks performed by a service animal must be directly related to the individual's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who

are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition. Id.

Mont. Code Ann. 49-4-203 (2) defines a service animal as “a dog or other animal individually trained to provide assistance to an individual with a disability.” Montana law provides that a service animal, pursuant to Admin. R. Mont. 37.90.449(6), must be “trained to undertake particular tasks on behalf of a recipient that the recipient cannot perform and that are necessary to meet the recipient's needs for accessibility, independence, health, or safety.” Montana case law interprets the MHRA similarly. See, e.g., McDonald, ¶62, (a reasonable accommodation under the ADA and the Montana Human Rights Act is best understood as a means of removing barriers to equal use and enjoyment of facilities). Admin. R. Mont. 37.40.1101(7)(d) refers to service animals not only specifically trained but also certified.

Under the ADA and MHRA, a person with a disability must prove that her dog is truly a service animal and not simply a pet. See, e.g., Prindable v. Association of Apartment Owners of 2987 Kalakaua, 304 F.Supp.2d 1245, 1256-7 (D.Hawaii 2003) aff'd 453 F.3d 1175 (9th Cir. 2006) cert. denied 549 U.S. 1216, 127 S.Ct. 1267, 167 L.Ed.2d 92 (2007); Brown v. Cowlitz County, 2009 WL 4824010 (W.D.Wash. Dec 09, 2009); Timberlane Mobile Home Park v. Washington State Human Rights Com'n, 95 P.3d 1288, 1291 (Wash.App. Div. 2 2004)(citation omitted). There must be some showing that the animal is useful to helping a charging party overcome or lessen barriers to equal access. McDonald, ¶62.

In this case, there is no evidence that Charging Party's dog has been trained as a service animal within the meaning of the law. Moreover, there is no evidence that the charging party either can or needs to use the animal as a means to remove or lessen any impediment to equal access to the respondent's store. Her request to use the dog in the respondent's store was not a request for a reasonable accommodation and without such a showing, she cannot prove her prima facie case. Therefore, the charging party cannot prove discrimination and her case must be dismissed.

IV. ORDER

Based on the foregoing, judgment is entered on behalf of the respondent SNG, Inc., and against charging party Katherine Easton. Easton's case is hereby dismissed.

DATED: March 12, 2012

/s/ GREGORY L. HANCHETT

Gregory L. Hanchett, Hearing Officer
Hearings Bureau, Montana Department of Labor and Industry

NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Katherine Easton; and Eric Edward Nord, Attorney for SNG, Inc., d/b/a 3G's.

The decision of the Hearing Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court. Mont. Code Ann. § 49-2-505(3)(c)

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, WITH 6 COPIES, with:

Human Rights Commission
c/o Marieke Beck
Human Rights Bureau
Department of Labor and Industry
P.O. Box 1728
Helena, Montana 59624-1728

You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND 6 COPIES OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights

Commission pursuant to Mont. Code Ann. § 49-2-505 (4), precludes extending the appeal time for post decision motions seeking relief from the Hearings Bureau, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).